STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS BRIAN CALHOUN,

Defendant-Appellant.

UNPUBLISHED
November 6, 2003

No. 239234
Muskegon Circuit Court
LC No. 01-046238-FH

Before: Bandstra, P.J., and Hoekstra, and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of resisting and obstructing a police officer, MCL 750.479, for which he was sentenced as a habitual offender, fourth offense, MCL 769.12, to three to fifteen years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first challenges the state's right to prosecute him for resisting and obstructing while being taken into protective custody. We disagree on two grounds. First, defendant's claim is premised on a mischaracterization of the facts. The record clearly indicates that while the investigating officer initially considered the possibility of protective custody, he ultimately arrested defendant for being a disorderly person. Second, nothing in the incapacitated persons act, MCL 333.6501 *et seq*., prohibits prosecution of a drunk and disorderly person who resists arrest.

The act provides that a municipality cannot criminalize "public intoxication, being a common drunkard, or being incapacitated," MCL 333.6523(1), but does not preclude a municipality from adopting a local ordinance consistent with MCL 750.167, the disorderly persons statute. MCL 333.6523(4). If a person who is drunk in public endangers others or causes a disturbance, he is a disorderly person, MCL 750.167(1)(e), and subject to criminal punishment despite the incapacitated persons act. MCL 333.6523(4). Being a disorderly person is a misdemeanor, MCL 750.168, and if the misdemeanor is committed in the presence of an officer, the disorderly person can be arrested without a warrant. MCL 764.15(1)(a). "Resistance to a legal arrest is illegal" and subjects the disorderly person to prosecution for resisting and obstructing. *People v Harbin*, 13 Mich App 588, 589; 164 NW2d 754 (1968).

Defendant next challenges the sufficiency of the evidence. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both

direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of the crime at issue are "(1) the conduct alleged, whether active or passive, obstructed, resisted, or opposed (2) any of the listed officials (3) in their described duties and (4) the alleged conduct was done knowingly and wilfully." *People v Vasquez*, 240 Mich App 239, 244; 612 NW2d 162 (2000), rev'd on other grounds 465 Mich 83 (2001). Knowingly and wilfully means that defendant intended to do a proscribed act and did the act to a police officer, knowing him to be an officer. *People v Gleisner*, 115 Mich App 196, 198-199; 320 NW2d 340 (1982). The crime requires that defendant oppose a police officer engaged in the execution of any lawfully assigned duty by actual physical interference or by expressed or implied threats of physical interference. *People v Vasquez*, 465 Mich 83, 99-100, 114-115; 631 NW2d 711 (2001). "Where police officers observe a defendant intoxicated in a public place, the officers have not only the right but the duty to arrest him and resistance to the legal arrest is unlawful." *People v Kurzinski*, 26 Mich App 671, 675; 182 NW2d 671 (1970).

The evidence showed that a uniformed officer in a marked police car confronted defendant, who was extremely intoxicated. This was defendant's second encounter with a police officer. Earlier, defendant had been told to leave the bar where he had been drinking. After finally leaving the bar, defendant began to utter profanities at the police officer. Instead of arresting defendant at that point for disorderly conduct, the officer gave defendant the option of a cab ride home or walking. Defendant refused a cab ride and started walking down the street. Shortly thereafter, reports came in about an intoxicated person jumping in front of traffic. The officer who had the initial encounter with the defendant at the bar then radioed the description of defendant. When defendant was stopped, the officer making the stop confirmed that defendant was the same person with whom the officer had initial contact a short time before.

When the officer made the initial stop of defendant, he pulled up alongside defendant and tried to engage him in conversation. Initially, defendant refused to respond. Next, defendant stopped walking, turned toward the patrol car and began shouting obscenities. Rightly fearing for his safety, the officer requested back-up before approaching defendant. After back-up arrived, the officers informed defendant that he was under arrest for disorderly person. Defendant thereafter began screaming obscenities at the officers and attempted to leave, ignoring the officers repeated statements that he was under arrest. He had to be physically subdued in order for the officers to handcuff him, and he then refused to get into the police car by throwing himself to the ground and refusing to move. That evidence was sufficient to prove that defendant knowingly physically opposed police officers in the performance of their duties. Although defendant was highly intoxicated, voluntary intoxication is a defense only to a specific intent crime, *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995), and resisting and

obstructing a police officer is not a specific intent crime, *People v Chatfield*, 143 Mich App 542, 546; 372 NW2d 611 (1985); *Gleisner, supra* at 200.

Defendant next challenges the scoring of the statutory sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Offense variable 9 is to be scored at ten points if 2 to 9 victims were involved. MCL 777.39(1)(c). The instructions state that "each person who was placed in danger of injury or loss of life" is counted as a victim. MCL 777.39(2)(a). Defendant was assessed ten points. The evidence showed that both officers had to wrestle defendant to the ground to handcuff him when he refused to submit to arrest. Both officers were placed in a position of danger of injury. Thus, the trial court was correct in scoring ten points.

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello